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No. 95-586

In the Supreme Court of the United States

OCTOBER TERM, 1995

STATE OF WISCONSIN, ET AL., PETITIONERS

v.

GERALD R. MUELLER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONSE FOR THE FEDERAL RESPONDENTS TO PETITIONERS' MOTION TO GRANT WRIT OF CERTIORARI AND TO VACATE OPINION AND DECISION FOR WANT OF JURISDICTION

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STATEMENT

This suit was filed by state employees (the Mueller respondents) against the State of Wisconsin and various state officials and agencies (petitioners). The Mueller respondents alleged that petitioners had violated the Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.* (FLSA), by failing to pay them overtime compensation. See Gov't Br. in Opp. 6-7. The FLSA expressly authorizes employees to sue state entities for violations of the FLSA. 29 U.S.C. 216(b) (a suit under the FLSA may be brought against any employer, including a "public agency"); 29 U.S.C.

203(e)(2)(C) (public agency includes "a State [or] political subdivision of a State").

The district court dismissed the suit, holding that the disciplinary deduction component of the Secretary of Labor's salary basis test for determining whether employees are exempt from overtime requirements is invalid as applied to public employees. Gov't Br. in Opp. 7-10. The court of appeals reversed and remanded, holding that the disciplinary deduction rule is valid as applied to public employees. *Id.* at 10-13. Petitioners filed a petition for a writ of certiorari seeking review of that ruling, and that petition is pending before this Court. As we explain in our brief in opposition (at 13-26), we do not believe that the question of the validity of the Secretary's regulations in this setting warrants review by this Court. Although the Court had granted certiorari in *Seminole Tribe of Florida* v. *Florida*, 116 S. Ct. 1114 (1996), when petitioners filed their petition for a writ of certiorari in this case, their petition did not present any question concerning Congress's power to subject the States to suit under the FLSA. Nor had petitioners raised that question at any stage of the litigation prior to filing their petition for a writ of certiorari.

Since the filing of the certiorari petition, this Court issued its decision in *Seminole Tribe*. Petitioners now request that the Court grant their petition and vacate the decision below in light of *Seminole Tribe*.

DISCUSSION

In *Seminole Tribe*, the Court held that Congress lacks authority under the Indian Commerce Clause to abrogate a State's immunity from suit in federal

court. 116 S. Ct. at 1119. The Court concluded that "[e]ven when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States." *Id.* at 1131. The Court acknowledged that *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1 (1989), had held that Congress has power under the Interstate Commerce Clause to abrogate a State's immunity from suit. 116 S. Ct. at 1125. The Court concluded, however, that "the result in *Union Gas* and the plurality's rationale depart from [the] established understanding of the Eleventh Amendment and undermine the accepted function of Article III." *Id.* at 1128. The Court therefore overruled *Union Gas*. *Ibid.*

Seminole Tribe significantly alters the constitutional analysis applicable in determining whether Congress has authority to subject the States to suit. Accordingly, following *Seminole Tribe*, this Court has granted certiorari, vacated the judgment below, and remanded for further consideration in light of *Seminole Tribe* in several cases in which the court of appeals had upheld Congress's power to abrogate the States' Eleventh Amendment immunity. See *e.g.*, *University of Houston* v. *Chavez*, No. 95-851 (May 13, 1996) (Copyright and Lanham Acts); *Ohio Agricultural Commodity Depositors Fund* v. *Mahern*, 116 S. Ct. 1411 (1996) (Bankruptcy Code). The Court might choose to follow a similar course here.

In this case, however, because petitioners did not assert below that they were immune from suit under the Eleventh Amendment, the court of appeals did not address that question. The court of appeals held only that the Secretary of Labor's regulations are valid as

applied to public employees, and it remanded for a determination of the merits of the Mueller respondents' suit. That interlocutory ruling does not foreclose petitioners from asserting on remand in the district court that they are immune from suit in light of *Seminole Tribe*. Indeed, before filing the instant motion to vacate in this Court, petitioners filed in the district court a motion to dismiss in light of *Seminole Tribe*, and the district court has directed the parties to file briefs on that issue. If the Court denies the petition for a writ of certiorari, which raises only the question of the validity of regulations issued by the Secretary of Labor, the question of petitioners' Eleventh Amendment immunity from suit will be litigated in the district court in the first instance, on petitioners' pending motion to dismiss. In ruling on that motion, the district court will be free to consider whether Congress has authority to subject the States to suit under the FLSA, as well as whether petitioners have waived their immunity from suit.

CONCLUSION

The motion to grant the petition for a writ of certiorari and vacate the judgment of the court of appeals for want of jurisdiction should be denied, and the petition for a writ of certiorari should be denied. In the alternative, the Court may wish to grant the petition for a writ of certiorari, vacate the judgment of the court of appeals, and remand the case for further consideration in light of *Seminole Tribe*.

Respectfully submitted.

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